Lagerlöf & Leman
August 13, 1991
Final Draft

The Government
The Ministry of Health and Social Affairs

OPINION

Appellant: Turmac Tobacco Company, P.O. Box 7400, 1007 JK Amsterdam, the Netherlands

Legal Counsel: Attorney Peder Hammarskiöld, Lagerlöf & Leman, Box 5402, 114 84 Stockholm, tel 08 - 665 66 00

Matter: Warning texts for tobacco

Item: The Government's item number S 91/3471/J

The National Board of Health and Welfare, in its petition of June 6, 1991, rejects on all counts the arguments that the appellant has presented in his petition of March 15, 1991

The National Board of Health and Welfare has restricted itself to making a few brief remarks regarding the petition of the appellant, and in all other respects refers to the remarks the National Board of Health and Welfare has made regarding the appeals of Philip Morris AB and Svenska Tobaks AB.

On account of the opinion presented by the National Board of Health and Welfare, the appellant would hereby like to agree with the line of reasoning of Philip Morris AB in the petitions of the company of January 30, 1991 and April 2, 1991 and would like to state the following. The appellant refutes on all points the arguments of the National Board of Health and Welfare.

The remarks of the appellant are arranged under the same headings and heading numbers as the National Board of Health and Welfare has used in its petition.

2 a. The Freedom of the Press Act

The National Board of Health and Welfare claims in its petition of June 6, 1991, p. 2, that section 3 of the Freedom

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of the Press Act contains a prohibition against the sale of tobacco products. However, the prohibition does not apply to tobacco products whose packages are marked in accordance with the stipulations of the National Board of Health and Welfare, which means that the Warning Text Act can be described as a partial prohibition against the sale of tobacco products. Further, the National Board of Health and Welfare claims that all questions about legal protection in terms of freedom of the press and the right to a trade mark for the packages of the product are irrelevant in the case that a prohibition against sales is imposed on a product. Also, such protection, according to the National Board of Health and Welfare, does not entail the right for the manufacturer to continue selling the prohibited product.

The line of reasoning of the National Board of Health and Welfare is totally incorrect, and seems to be built on some kind of semantic play on words. It is, of course, completely permissible to sell tobacco products in Sweden, and it is incorrect that there should be some kind of prohibition against the sale tobacco products. Even if the right of the National Board of Health and Welfare to stipulate warning texts should be interpreted as a partial prohibition against sales, this does not mean that the National Board of Health and Welfare is free to ignore legal protection in terms of freedom of the press and the right to a trade mark.

According to the National Board of Health and Welfare, it is clearly apparent from the prefaces to the Warning Text Act (Bill 1975/76:49) that the Act is not in conflict with the Freedom of the Press Act. However, at no time has the appellant questioned the right of lawmakers to implement the Warning Text Act. Instead, the appellant argues that the National Board of Health and Welfare has no right to implement a completely new warning text system that is directly counter to the warning text system that is a result of the Warning Text Act, and which moreover is in conflict with the Freedom of the Press Act. It can be seen from the prefaces to the Warning Text Act (Bill 1975/76:49, p 22), that certain types of warning texts can come into conflict with the Freedom of the Press Act. In the previous warning text case, the Government moreover revoked a number of warning texts that contained generally phrased exhortations in conflict with the Freedom of the Press Act. It is also apparent from the decision of the National Board of Health and Welfare of January 9, 1991, p 6, that the National Board of Health and Welfare has been aware of this. Despite this, the National Board of Health and Welfare now claims that legal protection in terms of freedom of the press and the right to a trade mark for the package of a product is irrelevant in the case that a prohibition to sell is imposed upon a product under the Warning Text Act. In this matter the National Board of Health and Welfare makes a reverse interpretation of constitutional law and arrives at the conclusion that the Warning Text Act ought to have precedence over the Freedom of the Press Act. That the National Board of Health and Welfare does not respect basic rights and freedoms is particularly serious; rights and

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freedoms which in this case have gained expression in a constitutional Act such as the Freedom of the Press Act.

The new warning texts of the National Board of Health and Welfare do not fulfill the purpose of the Warning Text Act. Instead, the purpose of the National Board of Health and Welfare – with the help of implementing radically enlarged and changed warning texts – is to prevent and to make it more difficult for the tobacco companies to market their products (cf the proposal of the consultative group of December 20, 1989, p 5, appendix 6 of the opinion of Philip Morris AB of January 30, 1991).

2 b. The Warning Text Act

According to the National Board of Health and Welfare, no limitations for the National Board of Health and Welfare to issue warning texts in regard to how the warning texts are to be formulated and affixed to the package are implied in the prefaces to the Warning Text Act. Instead, only certain requirements are given about how the warning texts are to be worded (cf the opinion of the National Board of Health and Welfare, p 2). According to the National Board of Health and Welfare, it is only in the last-mentioned respect that freedom of the press aspects must be taken into account, and according to the National Board of Health and Welfare this does not have anything to do with the prohibition against censorship of the Freedom of the Press Act or the right of the manufacturer to determine the design of the package himself.

The line of reasoning of the National Board of Health and Welfare is totally incorrect. It is self-evident that the prefaces to the Warning Text Act and the wording of the Act cannot have precedence over the prohibition against censorship in the Freedom of the Press Act. Unfortunately, this relationship does not appear to be clear to the National Board of Health and Welfare. It is apparent from the line of reasoning of the National Board of Health and Welfare that the National Board seems to believe that only such freedom of the press aspects can be taken into account that are mentioned in the Warning Text Act or in its prefaces. This, however, is not the case. As every attorney knows, it is in the nature of constitutional law that it is "above" ordinary law, and that therefore when there is a conflict in law, it has precedence over ordinary law. Therefore, the prefaces to the Warning Text Act provide no support for the argument of the National Board of Health and Welfare that the Freedom of the Press Act should be applicable only in part. On the other hand, the prefaces do support the argument of the appellant that the application of the Warning Text Act can come into conflict with the Freedom of the Press Act. The implementation of larger warning text squares of such a size that the National Board of Health and Welfare has decided on constitutes censorship interference in obvious conflict with the prohibition against censorship of the Freedom of the Press Act. Moreover, the pictorial elements shall fulfill the requirements for objectivity and neutrality, which they do not do (cf the opinion of Associate Professor

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Hans Gunnar Axberger, appendix 3 of the opinion of Philip Morris AB of January 30, 1991).

The purpose behind the Warning Text Act and the wording of the Act itself leaves no room for implementing the type of warning text that the National Board of Health has now decided on.

2 c. Trade Mark Legislation

According to the National Board of Health and Welfare, the right to freely use a trade mark - even in conflict with limitations laid down in law - is not included in the proprietorship to the trade mark. Anything else, according to the National Board of Health and Welfare, would be obviously unreasonable, since in such a case a businessman would be able to register the entire package print as a trade mark and with reference to that resist every form of warning text on the package and continue to sell the product. Further, the National Board points out that the freedom of a businessman to determine the package print himself, can be restricted by the government establishing conditions for how the package print shall be formulated in certain respects, and that according to the prefaces of the Warning Text Act this is compatible with the basis for the regulation in ch 1 s 9 of the Freedom of the Press Act that deals with prohibition against commercial advertisements to the extent that advertisements are used in the marketing of inter alia tobacco products. The National Board of Health and Welfare feels that the rules of the Freedom of the Press Act that state that advertising print for tobacco may be prohibited cannot be nullified by regulations in the Act on Trade Marks. Because of this, according to the National Board of Health and Welfare, neither can the regulations of the Warning Text Act be nullifies by the right to a trade mark that belongs to the appellant (cf petition of the National Board of Health and Welfare, p 2).

The appellant wishes to emphasize here that there are no rules in the Freedom of the Press Act about print on packages being able to be prohibited, especially not by implementing regulations issued by the National Board of Health and Welfare. In addition, the appellant has not argued that the regulations of the Warning Text Act can be nullified by the right to a trade mark that belongs to the appellant. What the appellant has argued is that the size and design of the new warning texts are in conflict with the Act on Trade Marks and therefore also with the Paris Convention. The present Swedish warning texts and the warning texts that apply in accordance with the EC Directive are not in conflict with the Act on Trade Marks. It is only the new design of the warning texts that is in conflict with both the Act on Trade Marks and the Warning Text Act.

The Act on Trade Marks gives the proprietor of a trade mark the right to market his products under certain distinguishing trade marks. Therefore, it is self evident that if a warning

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text, in principle, covers the greater part of, or the entire trade mark on a package, then this is in conflict with the purpose behind the trade mark legislation. In addition, an increased confusion of the packages will be the result of the size of the new warning texts of the National Board of Health and Welfare since it obstructs and makes a distinction between trade marks more difficult.

In the opinion of the appellant, it can never have been the intention of the Warning Text Act that the warning texts should overshadow the trade mark or the package design of the tobacco product. Instead, the purpose of the Warning Text Act is to provide the consumer with information about possible health hazards that are associated with the use of tobacco. The warning texts shall be of such a size that they are clear and easy to read by the consumer. The present size of the warning texts fulfills this purpose very well. Moreover, the present Swedish warning texts are larger than those of most other countries in the world.

The appellant can also note that the National Board of Health and Welfare has not cited any arguments or evidence that challenge the conclusions of Professor Holmqvist that the decision of the National Board of Health and Welfare is in conflict with the Trade Mark Act and the Paris Convention.

The appellant would also like to stress that the article that the National Board of Health and Welfare cites in its opinion of March 25, 1991 p 4 concerning the appeal of Philip Morris AB, according to an opinion by Professor Holmqvist (see appendix 1), only deals with licensing, and therefore cannot be cited as support for the opinion of the National Board of Health and Welfare that the Paris Convention does not "protect" against e.g. labelling requirements.

Compare even what is stated regarding trade obstacles under item 2 e.

2 d. The EC guidelines

According to the National Board of Health and Welfare, it will be first in connection with membership negotiations that it will be unavoidably necessary to take a stand on the question, if and when Sweden will adapt its warning text system to the EC, and that such an adaptation at present must be said to entail a pronounced weakening. In regard to negotiations about a so-called EES agreement, according to the National Board of Health and Welfare a main line of argumentation of Sweden has been that the agreement shall not force a weakening of Swedish legislation for the protection of health and the environment. If this succeeds, according to the National Board of Health and Welfare, an adaptation to the EC rules ought not to be necessary at present (cf the opinion of the National Board of Health and Welfare p 3).

The appellant holds that the reasoning of the National Board of Health and Welfare is totally incorrect. It cannot be right to start to apply a new warning text system that, to a great

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extent, is different from the system the EC has chosen. A Swedish authority cannot avoid following the framework and guidelines that the Swedish parliament has decided on, namely an adaptation to the EC. The EC Directive, 1989/622 EEC, regarding labelling of tobacco products will be of importance to Sweden as soon as Sweden signs the so-called EES agreement, if Sweden does so (cf the opinion of Professor Bernitz, appendix 1 of the opinion of Philip Morris of April 2, 1991). There is nothing that indicates that an exception could be able to be made regarding these rules. According to the view of the appellant, the EC system corresponds well to the present Swedish warning text system, and that an implementation of this would not, as the National Board of Health and Welfare claims, entail any weakening. The EC system is even somewhat stricter for manufacturers in that there shall be warning texts on both sides of the package. It is, however, essential that Swedish warning texts are adapted to the EC texts.

2 e. Trade obstacles

The National Board of Health and Welfare has pointed out that it is stated in the prefaces to the Warning Text Act, p 13, that an implementation of the Act can bring about cost increases for foreign products that are imported into Sweden, and that it is realistic to count on certain rare products perhaps being taken off the Swedish market, which means that the possibility for consumers to choose between different brands will be restricted. In addition, it states that these repercussions on competition and freedom of choice may not prevent the implementation of the stipulations in the law, according to the commission of inquiry, since they aim at spreading information that is important for the individual's health and well-being (cf the opinion of the National Board of Health and Welfare p 3).

On account of this, the appellant would like to point out that it also states on p 13 of the prefaces that the stipulations should be made as neutral in terms of competition as possible. The present warning texts do not constitute interference that necessitates a new package. On the other hand, the new warning texts are much more burdensome than the present warning texts since they constitute such a great interference with the package. The appellant, who sells a number of brands with small sales in Sweden through its subsidiaries and companies close to it, will most likely not be able to create new packages intended only for Sweden. Therefore, some of these brands might have to be taken off the Swedish market. This means that the new warning texts are not as neutral in terms of competition as possible and therefore do not fulfill the statement in the prefaces to the Warning Text Act.

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2 f. In General about the decision of the National Board of Health and Welfare

The possibilities of varying the warning texts that are provided in the Warning Text Act only refer to the wording of the text itself, in the opinion of the appellant.

It shall even be pointed out that the present warning texts were changed only five years ago by government decision number 9 of April 10, 1986. Since then, no new information has been made available to necessitate the implementation of any radical changes in the present warning text system. It is the opinion of the appellant that very strong reasons are necessary for implementing the changes in the warning text system that have now been decided. However, the National Board of Health and Welfare has not cited any studies or evidence that supports the opinion of the National Board of Health and Welfare that it ought to be necessary to implement far-reaching changes.

The scientific evidence that the National Board of Health and Welfare has chosen as scientific support for the new warning texts is selective and omits references to studies that advance a different opinion than that of the National Board of Health and Welfare.

2 g. Pictorial elements

To be sure, in the Warning Text Bill it is stated that it should be allowed to stipulate that one symbol shall be affixed in connection with the text. The National Board of Health and Welfare feels that the pictorial elements that are part of the new texts are symbols in the normal sense of the word, i.e. figures with a certain intended content (cf the opinion of the National Board of Health and Welfare, p 4).

The appellant feels that the implementation of pictorial elements instead of symbols is in conflict with the Warning Text Act. Having several different symbols is even in conflict with the Warning Text Act.

Therefore, already as a consequence of the Warning Text Act, it is not permissible to have several different pictorial elements instead of symbols of the kind that the National Board of Health and Welfare has now proposed. Pictorial elements of the kind that the National Board of Health and Welfare has proposed with a suggestive and opinion-forming content are in conflict with the Freedom of the Press Act (cf the opinion of Axberger, p 7). Therefore, having opinion-forming illustrations of the warning texts is in conflict both with the Warning Text Act and the Freedom of the Press Act.

2 h. Increase in the size of the warning text square

It is correct, in itself, that neither maximum or minimum formats for the warning texts are laid down in the Warning Text Act, as the National Board of Health and Welfare has pointed out. However, lawmakers never intended implementing

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any warning texts of the size that the National Board of Health and Welfare has now decided on, which cover the whole or the greater part of the package. Lawmakers assumed that the National Board of Health and Welfare - as government bodies in Sweden usually do - would strive for a reasonable balance between the warning text and the trade marks that are on the package.

As has earlier been mentioned, it is apparent from the prefaces to the Warning Text Act, p 22, that it is important that the National Board of Health and Welfare does not design the warning texts so that they come into conflict with the Freedom of the Press Act. According to the National Board of Health and Welfare, the increase in size of the warning text square is not in conflict with the Freedom of the Press Act (cf the opinion of the National Board of Health and Welfare, p 4). However according to Associate Professor Axberger, the fact that the obligation to have warning texts becomes so far reaching that it covers a greater part of the package print is clearly in conflict with the Freedom of the Press Act and trade mark legislation (cf the opinion of Axberger, appendix 3 of the petition of Philip Morris AB of January 30, 1991).

The warning texts that have been decided on by the National Board of Health and Welfare cannot be affixed to all packages that are found in stores.

The National Board of Health and Welfare feels that it is unreasonable to start from the smallest package on the market and use this as a measuring stick to design the warning texts for all other packages, but instead feels that the texts should be designed using packages that dominate on the market. According to the National Board of Health and Welfare, dispensations have been granted in a spirit of generosity in those cases where the warning texts could not be affixed to certain packages. The National Board of Health and Welfare of course intends to continue with this practice. According to the National Board of Health and Welfare, this is a suitable choice of method (cf the opinion of the National Board of Health p 4).

With regard to the circumstances, the appellant questions whether the National Board of Health and Welfare will continue to grant dispensations "in a spirit of generosity" from the implementing regulations. The appellant does not feel that the appellant should have to be subject to the discretion of the National Board of Health and Welfare and be forced to conduct its business in Sweden on the basis of dispensations from the National Board of Health and Welfare. Instead, the appellant holds that the regulations should be adapted to existing packages already from the beginning instead of the producers of certain packages having to apply for dispensation. Government bodies in Sweden normally ought to try to adapt the stipulations and rules so that the public is not afflicted with unnecessary prohibitions. The view of the National Board of Health and Welfare is in conflict with freedom of trade. A considerable insecurity regarding the rights of the individual arises if the decision of the National Board of Health and

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Welfare is allowed to stand. Otherwise, small packages that are now allowed will be hit by a "prohibition against sales", and the producers of these will have to apply for dispensation in order to continue selling their products, or they will have to cease selling their products in Sweden.

The reason lying behind the decision of the National Board of Health and Welfare to increase the size of the warning texts - as has been pointed out above - seems to be to "make the limitation of the producer's possibility to determine the package decor himself more stringent" (cf the consultative group of the National Board of Health and Welfare in its proposal of December 20, 1989, p 5). This purpose, however, is in conflict with the Warning Text Act.

2 i. Warning texts on both cartons and packs

Regarding the question whether the Warning Text Act intended that warning texts should even be able to be printed on cartons of cigarettes, according to the National Board of Health and Welfare the prefaces clearly show that such is the case. That the word, "carton", does not occur in the wording ought to be because the word was still regarded as being too commonplace by the middle of the 1970s to be suitable for official publication, according to the National Board of Health and Welfare (cf the opinion of the National Board of Health and Welfare, p 4).

This, however, is totally incorrect. Nowhere in the Warning Text Act or the prefaces is it stated that cartons of cigarettes can be labelled with warning texts. The expression, "carton of cigarettes", has been in existence since before World War II, and is not a commonplace word but is a correct, factual term. The expression has not only been a correct factual term in the tobacco industry for more than fifty years, but the expression, "carton of cigarettes" has also been used as the normal description for the sales unit that is usually used when the manufacturers sell to the retailers. If cartons had been intended by the lawmakers, then naturally they would have been written this.

The reason given by the National Board of Health and Welfare for labelling even cartons is that " the tobacco industry makes great efforts through advertising as well as lowering prices in order to get consumers to buy entire cartons" (opinion of the National Board of Health and Welfare of January 25, 1991, concerning the appeal by Philip Morris AB, p 11). This statement is not correct. The tobacco industry does not try to get the consumer to buy entire cartons. On the other hand it is agreed that there have been advertisements which for visual impact have featured the carton and that independent, individual tobacconists, have of their own volition sold whole cartons of cigarettes as well as 20's packs. Any price decreases on the purchase of whole cartons were carried out by the individual retailer concerned; but instances of this are very limited, being almost entirely confined to a few outlets in the centers of the largest cities in the country. Cartons, however, are a so-called bulk

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packages that are usually opened in the store and not by the consumer. That even the National Board of Health and Welfare held this as late as 1986 is apparent from the appended, "Remarks on the public notification of the National Board of Health and Welfare about warning texts and declarations of contents on tobacco products" (appendix 2).

The National Board of Health and Welfare cannot show any change at all in consumer behavior in the five years that have passed since 1986 that could warrant a decision to label even cartons of cigarettes. There must be a demonstrable problem in order to warrant interference with cartons of cigarettes on the part of society. There is no such problem, and thus there is no reason for labelling even cartons of cigarettes. As has been argued in previous documents, the Warning Text Act moreover does not permit warning texts on both packs of cigarettes and cartons of cigarettes. Legislation that means that a company or a person is enjoined to take a certain measure shall be interpreted restrictively, and the right to label of the National Board of Health and Welfare under the Warning Text Act, therefore, cannot be expanded by way of interpretation to include cartons of cigarettes.

2 j. Special warning texts for cartons of cigarettes

According to the National Board of Health and Welfare, it is apparent from government decision no 9 of April 10, 1986 both that each text shall be judged as a combined whole and that clarification and explanation can be included in the text (cf opinion of the National Board of Health and Welfare, p 4). However it is the opinion of the appellant that there is nothing in the government decision that indicates this.

The introductory passages in texts no 17 and 18 have originated, according to the National Board of Health and Welfare, in order to give the texts a concrete content in accordance with what is stated in the prefaces to the Warning Text Act. Further, the National Board of Health and Welfare feels that the texts must be characterized as brief in relation to the larger surface on this kind of cigarette package.

In the prefaces to the Warning Text Act it is stated, as has been mentioned earlier, that the formulation of the warning texts shall be brief, easy to read, and unambiguous. Therefore, having "introductory passages" in order to "give the texts a concrete content" is in conflict with the Warning Text Act. The length of the warning texts shall not be set in relation to the surface they are affixed to, as the National Board of Health and Welfare claims. In addition, as has been earlier pointed out, the warning text shall only contain objective information based on the results of research about health hazards, presented in a neutral manner. The content of the texts has nothing in common with these statements in the prefaces to the Warning Text Act and obviously encroach upon the area protected by freedom of the press (cf the opinion of Axberger, p 8). This means that the warning texts are in

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conflict with both the Freedom of the Press Act and the Warning Text Act.

In addition, the appellant is of the opinion that warning texts no 19 and 20 are a combination of several texts. The Warning Text Act does not permit more than one text per pack. Therefore, warning texts no 19 and 20 are in conflict with the Warning Text Act.

2 k. The individual texts in the decision of the National Board of Health and Welfare

The National Board of Health and Welfare argues on p 5 of its opinion that they have presented a scientific basis in their decision for every text. However, the choice of scientific literature by the National Board of Health and Welfare as scientific support for the new warning texts, as has been mentioned earlier, is selective and omits reference to studies that represent a different point of view. The new warning texts do not contain any factual information based on scientific studies in the field.

The appellant petitions the government anew to remit the decision of the National Board of Health and Welfare with instructions that the warning texts shall as far as possible be in agreement with the EC Directive and that the handling of the matter shall, in the future, shall be carried out in a correct manner.

Stockholm August 13, 1991

Peder Hammarskiöld

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